No. 17.

Brief of Kernan & Co. for D. C.

Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

Filed Oct. 27, 1899.

PETER L. ATHERTON,
Plaintiff in Error,
against
MARY G. ATHERTON,
Defendant in Error.

Brief for defendant in error.

STATEMENT.

This is a writ of error to the Supreme Court of the State of New York. It is to review a judgment entered upon the remittitur from the Court of Appeals in that State.

This action was brought by the wife, Mrs. Atherton, the defendant in error, against her husband, Mr. Atherton, the plaintiff in error, in the Supreme Court of the State of New York for a separation on the ground of cruel and inhuman treatment; and that his conduct towards her was such as rendered it unsafe and improper for her to cohabit with him; and for the care and custody of their child; and for the support of herself and their child.

Complaint, fols. 312 *to* 330.
New York Code of Civil Procedure, Sec. 1762.

Such action was commenced in January, 1893. At the time of the commencement of the action Mrs. Atherton had been for more than a year and was a citizen and resident of the State of New York, actually residing and domiciled within such State, and Mr. Atherton was a citizen and resident of the State of Kentucky. Mr. Atherton appeared in said action by his attorneys and put in his answer to the said complaint of Mrs. Atherton; a reply to some portion of such answer was put in by Mrs. Atherton.

Answer of Mr. Atherton, fols. 330 *to* 381.
Reply of Mrs. Atherton, fols. 381 *to* 384.

Said action and the issues therein were duly brought to trial and tried by the said Supreme Court without a jury at a Special Term thereof in June, 1893; after such trial, and in January, 1894, the court duly made and filed its decision and findings of fact and conclusions of law.

Findings of the Court, fols. 384 *to* 393.

Upon such findings and in accordance therewith judgment was duly and regularly entered adjudging that Mrs. Atherton was entitled to a separation from Mr. Atherton and from his bed and board; that she have the custody of their child; and that Mr. Atherton pay to her $125 per month for her support and $100 per month for the support and education of their child; and for $1,000 counsel fee and her costs and disbursements of the action.

Judgment, fols. 393 *to* 396.

Mr. Atherton filed exceptions to the findings of the court and appealed from said judgment to the General Term of the said Supreme Court.

Exceptions, fols. 396 *to* 410.
Notice of Appeal, fol. 410.

Such appeal was fully argued in the said General Term of the Supreme Court, and subsequently and in Novem-

ber, 1894, the said General Term modified the judgment so appealed from by striking therefrom the $1,000 allowed as counsel fee, and so modified, affirmed the judgment with costs to Mrs. Atherton.

Decision of General Term, fol. 428.

Judgment was duly entered in January, 1895, upon the decision of the said General Term affirming the said judgment so appealed from as modified, with costs to Mrs. Atherton.

Judgment, fol. 429.

From such judgment of affirmance Mr. Atherton appealed to the Court of Appeals. The appeal was fully argued in the Court of Appeals, and afterwards and in March, 1898, the said court rendered its judgment affirming in all things the said judgment so appealed from to said court and remitted its judgment of affirmance into the Supreme Court to be enforced therein according to law.

Remittitur, fols. 445 *to* 449.

Upon the receipt and filing of such remittitur the Supreme Court duly made and entered an order and judgment upon such remittitur making the judgment of the Court of Appeals the judgment of that court and for the costs of the said appeal to the Court of Appeals.

Order and Judgment, fols. 449 *to* 452.

To review such judgment as to the alleged errors stated in his petition, Mr. Atherton obtained the writ of error to this court.

Petition and Writ, fols. 453 *to* 462.

It was proved upon the trial and was found by the court, together with other facts, that on the 17th day of October, 1888, Mr. and Mrs. Atherton were married at Clinton, Oneida County, New York. That prior to and

at the time of such marriage Mrs. Atherton had been and was a resident of the State of New York, residing with her parents at Clinton, in the county of Oneida, in said State; and that Mr. Atherton had been and was a resident of the State of Kentucky, residing at Louisville in said State; that immediately after said marriage they went to and resided at Louisville and continued to reside there as husband and wife until in October, 1891, when she left him as hereinafter stated.

That a child of said marriage was born to them on the 8th day of January, 1890, being a daughter, named Mary V. Atherton.

That soon after the said marriage and continuing down to October 3, 1891, when Mrs. Atherton left him, Mr. Atherton was guilty of cruel and inhuman treatment to Mrs. Atherton without any just cause or reason. The court specified many acts of such treatment, and found that the acts, conduct and treatment of Mr. Atherton towards Mrs. Atherton during their married life were cruel and inhuman, and rendered it unsafe and improper for her to cohabit with him and justified her in leaving him as she did and seeking a residence separate and apart from him.

That on or about the 3d day of October, 1891, Mrs. Atherton left Mr. Atherton and the house where they resided in Louisville, taking with her their child and that she so left Mr. Atherton on account of his cruel and inhuman treatment, conduct of and towards her and for no other reason, and that she was justified in so leaving.

That after Mrs. Atherton had so left Mr. Atherton, and on or about October 10, 1891, Mr. and Mrs. Atherton and one Henry P. Goodenow entered into an agreement which was put in evidence by Mr. Atherton. This agreement will be found in the record at folios 300 to 303.

That in a few days after Mrs. Atherton had so left Mr.

Atherton she left the State of Kentucky and returned with her child to her mother at Clinton, Oneida County, New York, and that since that time she has resided with her mother at said Clinton in the State of New York and has been and is a resident of the State of New York and has not lived or cohabited with Mr. Atherton.

That when Mrs. Atherton so left Mr. Atherton and went to Clinton in the State of New York, she so left with the purpose and intention on her part not to return to the State of Kentucky, but to permanently become a resident of and reside in the State of New York; and with the intention of going to the State of New York and of changing her residence and domicile from the State of Kentucky to the State of New York, and to make her residence and domicile in the State of New York; and thereupon she became and has since been a resident of the State of New York and such state became and was and is her domicile and home.

That since Mrs. Atherton left Mr. Atherton, he has continued to reside and now resides at Louisville, Kentucky, and was and is a resident of the State of Kentucky.

That after Mrs. Atherton had so left Mr. Atherton and while she with her child were residing in the village of Clinton, in the State of New York, and in December, 1892, Mr. Atherton commenced an action in the Jefferson Circuit Court of the State of Kentucky, against Mrs. Atherton for a divorce upon the alleged ground that she had abandoned him in October, 1891, without fault on his part, and that such abandonment had continued for more than one year; that the petition in such action was not served upon Mrs. Atherton within the State of Kentucky, or at all, and she did not appear in such action in any manner; that such proceedings were had that on or about March 14, 1893, a decree was made in said action

dissolving the bonds of matrimony between Mr. and Mrs. Atherton.

That prior to and at the time of the commencement of said action and ever since, Mrs. Atherton had ceased to be a resident of the State of Kentucky, and had become and was a citizen and resident of the State of New York, domiciled and residing in the village of Clinton, in said State.

That she was not personally served with process in the said action within the State of Kentucky, or at all, nor did she in any manner appear or authorize an appearance for her in the said action, and that, therefore, the said judgment of divorce was inoperative, null and void as to her, and not binding upon her and was no bar or defense to her action in the State of New York.

Findings of the Court, fols. 384 *to* 393.

As we understand, the only question before this court under the writ of error is, as to the validity of the judgment made in Kentucky; was it valid and binding upon Mrs. Atherton; and should full faith and credit have been given to it in the State of New York?

ARGUMENT.

First.

The counsel for Mr. Atherton in their brief question the finding of fact of the trial court that Mrs. Atherton at the time of the commencement and during the pendency of the action in Kentucky was a resident of the State of New York, but remained and was a resident of the State of Kentucky, that being the residence of Mr. Atherton.

If this finding can be questioned in this court we submit that upon the evidence Mrs. Atherton had the legal right to change her residence from the State of Kentucky to the State of New York, and that she did do so and became and was a resident of the State of New York.

By reason of the cruel and inhuman treatment and conduct of and towards her by her husband as found by the court, she had the right to leave Mr. Atherton and to change her residence and domicile from the State of Kentucky to the State of New York.

A wife may acquire a residence and domicile separate and apart from that of her husband whenever it is necessary and proper for her to do so. Certainly it was eminently necessary and proper for Mrs. Atherton to leave her husband and his residence in Kentucky and go to and make her residence in the State of New York.

2 *Bishop on Marriage and Divorce, Sections* 124 *to* 128.

Cheever v. Wilson, 9 *Wallace, U. S. Rep.*, 108.

Barber v. Barber, 21 *Howard, U. S. Rep.*, 582, 593, 594.

Hunt v. Hunt, 72 *New York Reports*, 217.

Mellen v. Mellen, 10 *Abb. New Cases (New York)*, 329, *and note at the end of case.*

Shaw v. Shaw, 98 *Massachusetts Reports*, 158.

In Cheever v. Wilson, the Court, speaking on this point at page 123, says: "It is insisted that Cheever never re- "sided in Indiana; that the domicile of the husband is the "wife's and that she cannot have a different one from his. "The converse of the latter proposition is so well settled "that it would be idle to discuss it. The rule is that she "may acquire a separate domicile whenever it is necessary "or proper that she should do so. The right springs from "the necessity for its exercise and endures as long as the "necessity continues."

In Hunt v. Hunt, the Court, at page 242, says: "The "domicile of the husband is *prima facie* the domicile of the "wife. . . . . There are, however, exceptions to the "rule; one of which is invoked by the plaintiff in this "suit, so that in certain cases a married woman may have "a domicile in another jurisdiction than that of her hus- "band. This is so when they are living apart under a "judicial decree of separation, or when the conduct of the "husband has been such as to entitle the wife to an abso- "lute or limited divorce. She may acquire a separate "domicile whenever it is necessary for her to do so."

That Mrs. Atherton intended to change and did change her residence and domicile from the State of Kentucky to the State of New York and thereby ceased to be a citizen and resident of Kentucky, and became and was a citizen and resident of the State of New York from October, 1891, and that her purpose and intention to make such change was understood by Mr. Atherton at the time, as found by the court, are fully sustained by the evidence.

The agreement between them contemplated that she would seek a residence and domicile different from that of her husband. It provided that the domicile of the child was to be the State of Kentucky, but there was no such provision as to the wife. It provided for the expenses of the journey in conveying the child from the mother to the grandmother and back again, thereby showing that it was understood that the wife would have a different residence and domicile from that of her husband.

Mrs. Atherton left Kentucky and came to New York to reside with her mother in the village of Clinton. She swears that about ten days after she left her husband she left the State of Kentucky and returned to her mother at Clinton, in the State of New York; that she has lived with her, and that has been her residence ever since;

that she went to her mother's with the intention of making that her home; and that has been her home and such was her intention at the time she went there.

Evidence of Mrs. Atherton, fols. 30, 31.
Evidence of Mrs. Kelsey, fol. 96.

Mr. Atherton undoubtedly knew and understood when Mrs. Atherton left Kentucky with her sister and her aunt that she was going to her mother's home at Clinton; and he knew that she continued to live at Clinton with her mother up to and after the time he commenced his suit in Kentucky and obtained his divorce. The money payable to her by the agreement was remitted monthly to her at Clinton, as she was living at no other place during that time (fol. 250). Mr. Atherton in his answer admits that when he commenced the action in Kentucky Mrs. Atherton was at her home in Clinton (fol. 371). In the proceedings in the suit he brought against her in Kentucky she is described as a non-resident of Kentucky (fols. 262, 263, 264).

The claim is made that the reply of Mrs. Atherton is inconsistent with her having made a permanent change of residence. There is no such inconsistency. The agreement between them was made not for a separation of the parties, but to provide for the custody of the child. It provided that Mrs. Atherton would have to part with the child to the grandmother a portion of the time, and it was as to that provision of the agreement Mrs. Atherton understood it was an experiment and not to be permanent, but only to last for a year; and the reply had reference to such provision only. There was no claim and none could be made that the separation of the parties was to be temporary or experimental, or to last only a year, and the reply had no reference to any such separation.

The evidence and the attending circumstances clearly

prove that Mrs. Atherton intended to and did abandon her residence and domicile in Kentucky and came to her mother's at Clinton, in the State of New York, with the intention of making that her home; and that she has since resided there and made it her home; and that she became and was, from the time of going to Clinton, a citizen and resident of the State of New York, actually domiciled and residing in such State. The question was one of fact to be decided upon all the evidence and circumstances and was correctly decided.

DePuy v. Wurtz, 53 *New York Reports*, 556.
DeMeli v. DeMeli, 120 *New York Reports*, 486.
Phelps v. The N. Y. &c. Railroad Company, 17 *App. Div. R.* (*New York*), 392, 395.

It was competent and proper to prove that Mrs. Atherton was justified in leaving Mr. Atherton and the State of Kentucky, and going to the State of New York and making her home in that State; and that she became and was a citizen and resident of that State prior to and during the pendency of the action in Kentucky. Neither the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered. Want of jurisdiction may be shown either as to the subject matter or the person.

Boswell v. Otis, 9 *How. U. S. R.*, 336, 348.
Thompson v. Whitman, 18 *Wallace, U. S. R.*, 457.
Cole v. Cunningham, 133 *U. S. R.*, 107, 112.
Jones v. Jones, 108 *New York*, 415, 423.
Williams v. Williams, 130 *New York*, 193.

Second.

The judgment of divorce in Kentucky in favor of Mr. Atherton was no bar or defense to the action of Mrs. Atherton in the State of New York. Prior to and at the time of the commencement of the action in Kentucky and at the time the judgment was obtained in such action, Mrs. Atherton was not a citizen or resident of Kentucky and was not domiciled or residing in such State. She was a citizen and resident of the State of New York, actually domiciled and residing in such State. No process in the Kentucky action was personally served upon her in the State of Kentucky or at all, and she made no appearance in such action. The judgment, therefore, as to her was inoperative and void and did not bind her, and was no defense to her action in the State of New York.

So far as we have been able to discover it has never been held by this court that a judgment so obtained was valid or operative or binding upon the defendant therein who was a non-resident of the State in which the judgment was obtained and a citizen and resident of another State. This court has uniformly held that the only judgments obtained in the State courts which were valid and operative and binding upon non-residents, who were citizens and residents of other States, were judgments rendered in actions *in rem*, when property of the defendant was actually in the State where the actions were brought and substituted service of process was made upon the defendant; and in actions *in personam*, where the process in the action was personally served on the defendant in the State where the action was brought, or he voluntarily appeared in such action.

The personal service of process upon the defendant required must be made upon him personally within the

State where the action is brought. Personal service outside of such State is not sufficient.

Pennoyer v. Neff, 95 *U. S. R.*, 714.

An action was brought in Ohio to compel the specific execution of a contract relating to land where the defendants were non-residents of the State, and publication of process was made, the court gave a money decree and ordered the sale of other lands than those mentioned in the bill. The decree was held void. The court said: "Jurisdiction is acquired in one of two modes: First, "as against the person of the defendant by the service of "process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the "court. In the latter case the defendant is not personally bound by the judgment beyond the property in "question; and it is immaterial whether the proceeding "against the property be by an attachment or bill in "chancery. It must be substantially a proceeding *in* "*rem*."

Boswell's lessee v. Otis, 9 *How. U. S. R.*, 348.

An action of debt was brought in New York on a judgment recovered in Massachusetts. It appeared that the defendant in the judgment at the time the same was obtained was a citizen and resident of New York, and that the action was commenced by attachment which was served by attaching some furniture which belonged to the defendant, accompanied with a summons served on the wife of the defendant. The plaintiff was non-suited on the ground that the judgment was not binding upon the defendant. The non-suit was sustained by the court. The court at page 40 says: "The non-suit was properly directed. The defendant was not a resident of "Massachusetts when the suit was commenced. His "domicile was in this State and being in person here and

"not within the jurisdiction of the Court of Massachu-
"setts, he was not and could not have been served with
"process. The attachment of an article of his property
"could not bind him; it cou'd only bind the goods at-
"tached as a proceeding *in rem*., and the judgment ob-
"tained by default in pursuance of such an attachment
"can not be the ground here of an action against the de-
"fendant. To bind a defendant personally by a judg-
"ment when he was never personally summoned or had
"notice of the proceeding would be contrary to the first
"principles of justice." The court cites a number of cases in this and other courts.

Kilburn v. Woodworth, 5 *Johnson* (*New York*) *Reports*, 37, *cited with approval in* 95 *U. S.*, 732.

A judgment was obtained in New York against two partners, one of whom resided in Louisiana and was never served with process. An action upon the judgment was brought against such defendant in Louisiana. It was held that the action could not be maintained; and that Congress did not intend, by the act of 1890, to declare that a judgment rendered in one State against the person of a citizen of another who had not been served with process or voluntarily made defense, shall have such faith and credit in every other State as it had in the courts of the State in which it was rendered.

D'Arcy v. Ketchum, 11 *How. U. S. R.*, 165.

A judgment recovered in the Common Pleas at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here; it is simply null.

Bischoff v. Wethered, 9 *Wallace U. S. R.*, 812.

An action commenced by attachment and where substituted service was made, was brought in Tennessee and by a writ of error was brought to this court. In discussing the jurisdiction of the court, the court at pages 316, 317, 318, says: "Jurisdiction of the person is obtained "by the service of process or by the voluntary appear- "ance of the party in the progress of the cause. Juris- "diction of the *res.* is obtained by a seizure under process "of the court, whereby it is held to abide such order as "the court may make concerning it. . . . . If "the defendant appears the cause becomes mainly a suit "*in personam*, with the added incident that the property "attached remains liable under the control of the court, "to answer to any demand which may be established "against the defendant by the final judgment of the "court. But, if there is no appearance of the defendant "and no service of process on him, the case becomes, in "its essential nature, a proceeding *in rem.*, the only effect "of which is to subject the property attached to the pay- "ment of the demand which the court may find to be due "to the plaintiff."

Cooper v. Reynolds, 10 *Wallace U. S. R.*, 308, *cited with approval in Cole v. Cunningham*, 133 *U. S. R*, 107, 116.

A personal judgment is without any validity if it be rendered by a State court in an action upon a money demand against a non-resident of the State who was served by publication of the summons, but upon whom no personal service of process within the State was made, and who did not appear.

The State having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him, and her courts may adjudicate in reference to the same.

Pennoyer v. Neff, 95 *U. S. R.*, 714.

The court says at page 723: "It is in virtue of the "State's jurisdiction over the property of a non-resident "situated within its limits that its tribunals can inquire "into that non-resident's obligations to its own citizens, "and the inquiry can then be carried only to the extent "necessary to control the disposition of the property. If "the non resident have no property in the State there is "nothing upon which the tribunals can adjudicate."

Again, at page 727, speaking of substituted service, the court says: "Such service may answer in all actions "which are substantially proceedings *in rem*. But where "the entire object of the action is to determine the per- "sonal rights and obligations of the defendants, that is, "where the suit is merely *in personam*, constructive "service in this form upon a non-resident is ineffectual "for any purpose. Process from the tribunals of one "State cannot run into another State and summon parties "there domiciled to leave its territory and respond to "proceedings against them. Publication of process or "notice within the State where the tribunal sits cannot "create any greater obligation upon the non-resident to "appear. Process sent to him out of the State, and pro- "cess published within it, are equally unvailing in pro- "ceedings to establish his personal liability."

After having cited a number of cases, both in this court and in State courts, the court says, at page 730: "In "all the cases brought in the State and Federal courts "where attempts have been made under the acts of Con- "gress to give effect in one State to personal judgments "rendered in another State, against non-residents without "service upon them, or upon substituted service by "publication, or in some other form, it has been held "without an exception, so far as we are aware, that such "judgments were without any binding force except as to "property, or interests in property, within the State, to "reach and affect which was the object of the action

"in which the judgment was rendered, and which prop-
"erty was brought under control of the court in connec-
"tion with the process against the person. The proceed-
"ing in such cases, though in the form of a personal ac-
"tion, has been uniformly treated, where service was not
"obtained, and the party did not voluntarily appear, as
"effectual and binding merely as a proceeding *in rem.*,
"and as having no operation beyond the disposition of
"the property, or some interest therein."

The judgment of a court of a sister State recovered upon trustee process, or attachment proceedings, in which the defendant is not personally served with process, and does not appear, is effectual only to bind such property of the debtor as is found within the jurisdiction.

Ward v. Boyce, 152 *New York Reports*, 191,
and cases cited in this and other courts.

The court at page 196, says: "If the proceedings
"involve the determination of the personal liability of
"the defendant, he must be brought within the jurisdic-
"tion, by service of process within the State or voluntary
"appearance. If it be a proceeding *in rem*, the *res* must
"have been seized or attached, or at least must be within
"the jurisdiction."

The foregoing are a few of the cases in this court, and there are many of like character in the courts of some of the States, and they clearly show that the rule has been well established and adhered to that the only judgments in the State courts procured upon substituted service held to be valid and binding upon non-resident defendants, citizens and residents of other states, were judgments obtained in actions *in rem.* where property of the defendants was within the State in which the actions were

brought, and seized by the process of the court, to be held to satisfy the judgments when obtained. In other actions, actions *in personam*, the rule has been equally well established that judgments in State courts against non-residents, citizens and residents of other States, were not valid or binding upon the defendants unless process was personally served upon them within the State in which the actions were brought or they voluntarily appeared in such actions.

This court is now asked to depart from this rule, and make exception to the same, in actions for divorce, where one of the parties to the marriage contract brings an action in the State court of his or her residence against the other party who is a non-resident of such State in which the action is brought and a citizen and resident of another State, and to hold that judgments recovered in such actions, upon substituted service of process, and where the defendant was not personally served with process within the State where the action was brought and made no appearance in such action, are valid and binding upon the defendants in such actions in the States in which they are citizens and residents. This is asked upon the ground that actions for divorce are actions *in rem*, and therefore substituted service of process is sufficient to give the court jurisdiction of the defendants.

We submit that actions for divorce are not actions *in rem*, and do not come within the cases of that character decided by this Court. There is no *res*, no tangible property or thing within the State where such actions are brought which can be seized by the process of the Court, and which alone, with substituted service of process, gives jurisdiction to the Court in the actions. There is nothing to be adjudicated upon but the marriage contract, and this cannot make the actions *in rem*. Such actions are

actions *in personam*. They have reference to and affect the personal relations and obligations of the parties thereto, one to the other, the personal rights of property, of support, especially to the wife, of the personal character and position of the parties in society; in their objects and in their effects they are actions above all others *in personam* and should be treated as such.

The idea that the marital relation is a *status*, and that such *status* is a *res*, and that therefore, an action for divorce is an action *in rem*, and that the judgment of a State Court in such an action obtained by one party, a resident of such State, against the other party, a citizen and resident of another State, upon substituted service of process alone, is valid and dissolves the marriage contract between the parties, is of comparatively recent origin and was first put forth, we believe, by Bishop in his work upon marriage and divorce. It is evident from his work that Bishop was strongly in favor of the idea, and his conclusion that it should be adopted was more his own opinion than founded upon authority.

In speaking of this idea put forth by Bishop, that marriage creates a relation which is a *status*, and that this *status* is entitled to be treated as a *res*, in *McCreary v. Davis*, 44 *So. Carolina Reports*, *page* 207, the Court says: "Now this author admits that Bigelow, J., in *Lit-*
"*tle v. Little*, 13 *Gray*, 264, correctly stated that all author-
"ities concur in the conclusion that marriage has its origin
"and foundation in a purely civil contract. This is an,
"or rather, *the* initial point. How do these authors reach
"the conclusion which Dr. Bishop announces, and though
"the new relation, that is the *status*, retain some simili-
"tudes reminding us of its origin the contract does in
"truth no longer exist, but the parties are governed by
"the law of husband and wife. Is it not an assumption

"coined in order to give a plausible basis to the solution "of an otherwise untenable position? Is it not by this "means that they hope to give currency to an otherwise "baffled policy, namely: to so construct a plan that there- "by they may successfully invoke that portion of the "Federal constitution relating to the effect to be given by "all the States to the acts and judgments of one State, and "thus force all other States to give effect to judgments for "absolute divorces? If marriage were still esteemed a "civil contract, they could not hope to escape the defect "of jurisdiction hereafter to be discussed. But by coin- "ing this new term '*status*' and ascribing the efficacy of "'*res*' to it under certain principles hereafter to be refer- "red to, it is deemed by them, that the difficulty has been "overcome. We will investigate these later matters here- "after. Just now we are interested in this discovery "made by Dr. Bishop in the year 1852, which seems to "have become very popular with all those persons who "favor divorce laws."

The rule contended for, that judgments in actions for divorce in the State courts by one party, a resident of such State against the other party, a non-resident of such State, and a citizen and resident of another State, and upon whom substituted service of process only has been made, has not been established in this country by the decision of this court, as we understand. And while it has been adopted in some of our States, in others it has been totally repudiated. The rule has not been adopted in England or Scotland as to judgments of divorce in foreign countries obtained in such manner.

Brown on Jurisdiction, Sec. 77.

The rule is well settled in the State of New York by the decisions of its courts from an early date, and also in

some of the other States, by the decisions of their courts, that any judgment of divorce rendered in an action in one State in favor of a resident of such State against a non-resident of such State, and a resident and citizen of another State, upon substituted service of process and where there was no personal service of process upon the defendant within the State where the action was brought, and where the defendant did not appear in such action, was and is void and inoperative and of no force or effect against the defendant. That if such action be considered in the nature of an action *in rem.*, so far as it affects the marital *status*, the judgment can only affect the *status* of the party bringing the action in the State in which the judgment was rendered. That the judgment can have no extra territorial force or effect. That it cannot and does not affect the marital *status*, the rights or privileges of the other party, a citizen and resident of another State, and as to such party it is inoperative and void.

The following are some of the cases decided by the courts of the State of New York:

Borden v. Fitch, 15 *John. Reports*, 121.
Bradshaw v. Heath, 13 *Wend. R.*, 407.
Visher v. Visher, 12 *Barb. R.*, 640.
Kerr v. Kerr, 41 *N. Y.*, 272.
Hoffman v. Hoffman, 46 *N. Y.*, 30.
Hunt v. Hunt, 72 *N. Y.*, 217.
People v. Baker, 76 *N. Y.*, 78.
O'Dea v. O'Dea, 101 *N. Y.*, 23.
Jones v. Jones, 108 *N. Y.*, 415.
Cross v. Cross, 108 *N. Y.*, 628.
DeMeli v. DeMeli, 120 *N. Y.*, 485.
DeGarome v. Johnson, 86 *Hun*, 390.
Rigney v. Rigney, 127 *N. Y.*, 408.
Williams v. Williams, 130 *N. Y.*, 193.
People v. Karlsioe, 1 *App. Div. R.*, 571.
Bell v. Bell, 4 *App. Div. R.*, 527.

The question in 15 *Johnson*, 121, was as to the validity of a judgment of divorce obtained in Vermont against the wife who was a resident of Connecticut, and who had never been in the State of Vermont, and upon whom no personal service of process in the action had been made and who had not appeared therein. The judgment was held void. The court, at page 140, says: "To sanction "and give validity and effect to such a divorce appears to "me to be contrary to the first principles of justice. To "give any binding effect to a judgment, it is essential "that the court should have jurisdiction of the person "and of the subject matter; and the want of jurisdiction is "a matter that may always be set up against a judgment "when sought to be enforced or where any benefit is "claimed under it. The want of jurisdiction makes it "utterly void and unavailable for any purpose. The "cases in the English courts and in those of our sister "States as well as in this court are very strong to show "that judicial proceedings against a person not served "with process to appear and not being within the juris-"diction of the court, and not appearing in person or by "attorney, are null and void."

The Court then cites and comments upon several cases, and says at page 142: "It is said by the Court that to "bind a defendant personally by a judgment when he was "never personally summoned nor had notice of the pro-"ceedings, would be contrary to the first principles of "justice; and that whether the proceedings were valid "and according to the course of the Court in the place "where such judgment was obtained or not, would make "no difference. It must then be taken, I think, as a set-"tled law of this State, that a judgment obtained in a "sister State against a person not being within the juris-"diction of the Court, nor having been served with pro-"cess to appear, nor having appeared to defend the suit, "will be absolutely void. This principle must apply "equally to a divorce as to any other judgment. These

" are principles, too, that have been recognized and sanc-
" tioned in the State Courts under the Constitution and
" law of the United States as now existing."

The question in 12 *Barb.* 640, was as to the validity of a judgment of divorce obtained in Michigan against the wife upon publication of process in a newspaper, and which judgment was regular and valid under the laws of Michigan. No process was personally served upon the wife nor did she appear in the action. The judgment was held void. The Court cites a great many cases decided in this country and in England in support of its decision. In holding the divorce invalid, at page 647, the Court says: " It is a sound principle of law as well as of natu-
" ral justice, that no person should be bound by a judg-
" ment without an opportunity to be heard."

The question in 41 *N. Y.*, 272 was as to the validity of a judgment of divorce against the wife granted in Indiana, where neither of the parties in fact resided at the time, and where there was no personal service of process upon her within that State, nor authorized appearance for her. The judgment was held void upon the ground that there was no personal service of process upon the wife within the State of Indiana and no appearance by her in the action and therefore, the court acquired no jurisdiction of her. It was not held invalid upon the ground, as stated by the counsel for the plaintiff in error in their brief, that at the time the husband brought the suit he was not a citizen of Indiana, but was a citizen and resident of the State of New York, as clearly appears in the opinion of Mr. Justice Grover.

The question in 46 *N. Y.*, 30, was as to the validity of a decree of divorce obtained by the husband in Indiana. It appeared at the time of commencing the suit and while

it was pending, that both parties resided in New York. No process was personally served upon the wife and she did not appear in the action. The decree was held invalid. The statute of Indiana required notice of the petition to be published in some weekly paper published in the county. The court says at page 33: "The "State might as well have enacted that a divorce might "there be procured by *bona fide* residence without any no- "tice whatever to a non-resident upon proof of the re- "quired facts. Honest justice would be thus quite as "well attained."

And at page 34, the court says: "The necessary "effect of sustaining this decree would be to allow any "other State substantially to make laws for this State; to "regulate not only our domestic relations of husband and "wife, but almost every other right. A court "has no more authority to assume jurisdiction "over a marriage contract than over any other "subject without due service of process or the "appearance of the party defendant. . . . . For "the reason, therefore, that the Court in Indiana had no "jurisdiction of the subject of the action as the plaintiff "in that action was in fact, a resident of this State at the "time he claimed to have resided there, and went to In- "diana only to obtain this decree; and the defendant "therein was during all the time a resident of this State, "was never served with process or appeared in that "action, the decree therein cannot be enforced here, but "must be held void. This decision may operate harshly "upon innocent parties, but it cannot affect the rule "of law."

As to this case, the counsel for the plaintiff in error are mistaken in stating in their brief that it was held that the decree was not valid because it appears that at the time it was obtained in Indiana, both husband and wife resided in the State of New York. It clearly appears from the

opinion of the Court that the divorce would have been held void if the husband had been a resident of Indiana at the time of the commencement of and during the pendency of the action. The decision was based upon both grounds.

The question in 72 *N. Y.*, 217, was as to the validity of a decree of divorce obtained by the husband in Louisiana. It appeared that the husband and wife at the time of their marriage were citizens and residents of the State of Louisiana, and that they continued to reside there for some time, when the wife left the home of her husband and the State of Louisiana and did not return. It did not appear, nor was there any finding, that she had cause in the conduct of her husband for leaving him, or for an absolute or limited divorce. The husband continued a citizen and resident of Louisiana and obtained there the decree of divorce while the wife was absent from the State, and upon substituted service of process. The decree was held valid on the ground that the domicile of the wife was the domicile of the husband, and that therefore, she having no good cause for leaving him, her domicile was his domicile and that being in the State of Louisiana, she was subject to the laws of such State, and that substituted service of process authorized by the laws of such State gave the Court jurisdiction of her person in the action, the same as though the process had been personally served upon her in that State, or she had appeared in the action.

If, in that case, it had been shown and found, as it was shown and found in the case now before the Court, that the wife was driven from her husband by his cruel and inhuman treatment of and conduct towards her, and that she left him and the State where they resided and became a citizen and resident of another State, and that she was

justified in so doing, the Court would have held the decree, obtained as it was upon substituted service, void as to the wife in this State, as it had before and has since held.

In 76 *N. Y.*, 78, the question was as to the validity of a divorce procured by the husband in the State of Ohio against the wife, a citizen and resident of another State upon service of process upon the wife by publication. The decree was regular under the laws of the State of Ohio. It was held void as to the wife in another State. The Court at page 84, speaking in reference to the case of *Pennoyer v. Neff*, 95 *U. S.*, 714, and to that portion of the decision cited by counsel for the plaintiff in error in their brief, says: "The dictum in the case of "95 U. S., 714, even had it the force of a judgment does "not go to the extent needed, to overrule these decisions in "our State. It is there held that to warrant a judgment "*in personam* there must be personal service of process, or "assent in advance to a service otherwise. It is also "said that a State may authorize judicial proceedings to "determine the *status* of one of its own citizens towards "a non resident, which will be binding within the State, "though had without personal service of process or ap-"pearance. It is not said, much less is it authoritatively "decided, that a judgment thus got may do more than "establish the *status* of the parties to it, within the State "in which the judgment is rendered. The case just cited "is the latest annunciation known to us of the Supreme "Court of the United States. It does not overrule the "declarations of our own courts. It rather sustains them. "We must and do concede, that a State may adjudge the "*status* of its citizen towards a non-resident; and may "authorize to that end such judicial proceedings as it sees "fit; and that other States must acquiesce, so long as the "operation of the judgment is kept within its own con-"fines. But that judgment cannot push its effect over

"the borders of another State, to the subversion of its "laws and the defeat of its policy; nor seek across its "bounds the person of one of its citizens, and fix upon "him a *status* against his will and without his consent, "and in hostility to the laws of the sovereignty of his "allegiance.

"It is said, that a judicial proceeding to touch the "matrimonial relation of a citizen of a State, whether "the other party to that relation is or is not also a citi- "zen, is a proceeding *in rem*, or, as it is more gingerly "put, *quasi in rem*. But it was never heard that the "courts of one State can affect in another State the *rem* "there, not subjected to their process, and over the per- "son of the owner of which no jurisdiction has been got. "Now, if the matrimonial relation of the one party is the "*res* in one State, is not the matrimonial relation of the "other party a *res* in another State? And, hence, "if one party to a proceeding is domiciled in a State, the "*status* of that party, as affected by the matrimonial re- "lation, may be adjudged upon and confirmed or changed "in accordance with the laws of that State. But has not "the State in which the other party named in the "proceedings is domiciled, also the equal right to de- "termine his *status*, as thus affected, and to declare by "law what may change it, and what shall not change it? "If one State may have its policy and enforce it on the "subject of marriage and divorce, another may. And "which shall have its policy prevail within its own bor- "ders, or shall yield to that of another, is not to be de- "termined by the facility of the judicial proceedings of "either, or the greater speed in appealing to them. . .

"Whatever we may hold in the United States it will "not change results in foreign countries. And in seek- "ing for a rule which shall be of itself, from its own "reason, correct, we ought to find or form one, if may be, "that is generally applicable. However submissively we

"must concede to every sovereignty the right to maintain "such degree of strictness in domestic relations as it sees "fit, within its own territory, there is no principle of "comity which demands that another sovereignty shall "permit the *status* of its citizens to be affected thereby, "when contrary to its own public policy, or its standard "of public morals."

In 108 *N. Y.*, 415, the question was as to the validity of the decree of divorce obtained in the State of Texas by the wife against the husband. Substituted service of process was made on the husband in New York. Thereafter, he being in Texas filed his answer in the action and the action was tried and the decree granted. It was held that while the Texas court acquired no jurisdiction by the service of process in New York yet, that by going to Texas and filing his answer the court acquired jurisdiction, and therefore the decree was valid and binding upon the husband. At page 423, the Court says: "It is an elementary principle that no court "can lawfully adjudge rights of persons or property in "the absence of jurisdiction; and it is firmly settled that "a judgment of the court of another State is binding here "only so far as the court rendering it had jurisdiction. "It is not protected under the constitution and laws of "the United States from attack for want of jurisdiction. "If rendered without jurisdiction, it is not a judgment, "but a mere arbitrary prescription, without force as a ju- "dicial proceeding in another forum."

Again, at page 424, the Court says: "The marriage "relation is not a *res* within the State of the party in- "voking the jurisdiction of a court to dissolve it, so as to "authorize the Court to bind the absent party, a citizen of "another jurisdiction, by substituted service or actual no- "tice of the proceeding given without the jurisdiction of "the court where the proceeding is pending."

In 120 *N. Y.*, 485, the question was as to the validity of a decree of divorce obtained in Germany by the husband against the wife who was in New York, and upon whom substituted service of process was made. It was assumed the decree was obtained according to the law of Germany. It was held void as to the wife.

At page 495 the court says: "The Court has no extra "territorial jurisdiction and a person not domiciled in the "State or country cannot be charged *in personam* by ad- "judication there, unless he is personally served with "notice or process within it, or voluntarily submits him- "self to the jurisdiction of its court by appearing in some "manner in the action or proceeding sought to be insti- "tuted against him." Several cases in this court and in State courts are cited in support of such doctrine.

In 127 *N. Y.*, 408, the question was as to the validity of a decree of divorce obtained in New Jersey by the wife against the husband. The husband abandoned his wife in New Jersey and became a resident of New York. His wife continued to reside in New Jersey and brought an action for a divorce there. The husband appeared and filed an answer denying the allegations in the complaint. The issue so joined was never tried. The wife thereafter verified a supplemental complaint alleging acts of adultery after the commencement of the action. An order for service of this by publication was made and certified copies of the supplemental complaint and order were served upon the husband in New York. He made no further appearance, and upon his default, proofs being made of the allegations in the supplemental complaint, the decree was granted. The action in New York was brought by the wife to enforce this decree as to alimony and costs. It was held that the portion of the decree in question was void upon the ground that service of the supplemental complaint upon the husband in New York did not give the court jurisdiction. The court, at page

413, says: "The courts of the United States and those "of most of the several States, including New York and "New Jersey, hold a divorce to be valid as far as it "affects the marital status of the plaintiff which is grant-"ed by the courts of a State pursuant to its statutes to "one of its resident citizens in an action brought by such "citizen against a resident citizen of another State, though "the defendant neither appears in the action nor is served "with process in the State wherein the divorce is grant-"ed. (Several authorities cited.) But the courts of "this and some of the States hold that the marital status "of such non-resident defendant is not changed by a "judgment so recovered, he or she remaining a married "person." (Several authorities cited.)

This case was taken to this court and is reported in 160 *U. S.*, 531. This court held that the New York courts in dismissing the plaintiff's complaint did not give due effect to the provisions of the constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State. It so held, as we understand, upon the ground that the appearance of the husband in the action in New Jersey gave to the court jurisdiction of his person in that action, and that therefore, he was personally bound by the judgment, not only in New Jersey, but in the State of New York.

At page 539, the Court says: "But the defendant seeks "to avail himself of the well settled doctrine that it is "competent for a defendant when sued in the court of "his domicile on a judgment obtained against him in "another State, to show that the court of such other State "had not jurisdiction to render the judgment against him. "To sustain this position in this court, the defendant re-"lies upon the sixth finding of the trial court, which was as "follows: 'That the above named defendant was never "'served with process in New Jersey under said supple-

" 'mental bill. And never appeared therein or answered
" 'thereto, and the decree of the Court of Chancery of
" 'New Jersey, which was based entirely upon
" 'charges of adultery, contained in said supplemental
" 'bill, did not, under the laws of that State, become
" 'binding upon said defendant personally.'

"It is undoubtedly true, as claimed by the defendant "in error, that if the judgment of the Court of Chancery "of New Jersey was not binding upon the defendant "therein personally in that State, no such force could be "given to it in the State of New York."

The following are some of the decisions of the courts of some of the other States to the same effect:

Barber v. Root, 10 *Mass.*, 260.
Lyon v. Lyon, 2 *Gray*, (*Mass.*) 367, 368.
Prosser v. Warner, 47 *Vermont*, 667.
Doughty v. Doughty, 28 *New Jersey Eq.*, 581.
Flower v. Flower, 42 *New Jersey Eq.*, 152.
McGuire v. McGuire, 7 *Dana* (*Ky.*) 181.
Irby v. Wilson, 1 *Dev. & Battle*, (*No. Car.*) 568.
Cited in Arrington v. Arrington, 102, (*No. Car.*) 502, 512.
McCreary v. Davis, 44 *So. Car.*, 195.
Beard v. Beard, 21 *Indiana*, 321.
Cook v. Cook, 56 *Wisconsin*, 195.
Wright v. Wright, 24 *Michigan*, 180.
Garner v. Garner, 56 *Md.*, 128.
Coxe v. Coxe, 19 *Ohio State*, 502.

In 10 *Mass.*, 260, the question was as to a divorce obtained by the wife against the husband in the State of Vermont where they were then living. Effect was given to the divorce. In speaking of the laws of Vermont authorizing suits for divorce against non-residents the Court, at page 265, says: "The laws of Vermont which authorize

"the Supreme Court of that State to proceed in suits for "divorce instituted in favor of persons resident for a time, "but having no settled domicile within the State, against "persons resident and domiciled in other States, who are "not and never have been amenable to the sovereignty of "the State of Vermont, upon allegations of offences not "pretended to have been committed within the territory "of the State or contrary to the peace, morals or economy of "the society there, or in violation of any contract subsist- "ing, or which has ever been recognized there,—in short "where no jurisdiction of the parties or of the subject "matter can be suggested or supposed,—are not to be "justified by any principles of comity which have been "known to prevail in the intercourse of civilized States. "I must be permitted to say the operation of this as- "sumed and extraordinary jurisdiction is an annoyance "to the neighboring States, injurious to the morals and "habits of their people: and the exercise of it is for "these reasons, to be reprobated in the strongest terms, "and to be counteracted by legislative provisions in the "offended States."

This case was decided before the statute was passed in Massachusetts which is cited in the brief for the plaintiff in error, which declares such divorces of no force or effect in that State.

In 47 *Vermont*, 667, the question was as to the validity of a divorce obtained by the wife against the husband in the State of New York upon substituted service. It was held that the court acquired no jurisdiction of the person of the husband and that the decree for alimony rendered by it upon granting a divorce was not binding upon him in Vermont. The court says at pages 672, 673: "The "acts relied upon for the cause of divorce must have ac- "crued while the parties were subject to the law of the "forum where the divorce is granted; otherwise the courts

"in one jurisdiction might determine and administer the "marriage relation between citizens domiciled in another "jurisdiction. This would allow one jurisdiction to pass "laws in the language of Lord Ellenborough, in *Buchanan* "*v. Rucker*, 9 *East.*, 192, 'to bind the rights of the whole "'world.' The proposition is too absurd to require refu- "tation. In much the larger number of adjudged cases "and, as we think, of the better considered cases, it has "been held that the judgment rendered in a suit for "divorce in a State where the cause of action did not "accrue, and where the parties were not then living as "husband and wife, and where the defendant in the pro- "ceeding never was served with process nor voluntarily "submitted to the jurisdiction of the court, is wholly void "in any other jurisdiction than the one in which it was "rendered." (Citing a number of cases.) "The courts "of New York have gone quite as far as those in other "States in holding such judgments void. . . . . "The contrary doctrine has been maintained in *Harding* "*v. Allen*, 9 *Greenl.*, 140, *Ditson v. Ditson*, 4 *R. I.*, 89, "and *Tolen v. Tolen*, 2 *Black*, (*Ind.*,) 407. In *Ditson v.* "*Ditson* the vality of *ex parte* divorces in foreign States is "attempted to be upheld on the principle that jurisdiction "of the *cause* is acquired by the domicile of one of the "parties, notwithstanding the cause accrued without the "State, upon the ground that it pertains to all sovereign "States to declare conclusively a status of their own citi- "zens. But the soundness of these decisions is strongly "questioned both upon principle and authority by the "late Chief Justice Redfield in an article in 3 *Am. Law* "*Reg. N. S*, 193, in which he thoroughly reviews the "whole subject. He admits that such judgments may be "a protection to the parties obtaining them in the juris- "diction where they are obtained; but denies that they "have any validity in foreign jurisdictions. And such, "we think, is the better doctrine. Otherwise in de- "termining the status of its own citizens such sovereign

"State, necessarily conclusively determines the status of "the citizen of another sovereign State whenever the "other party to the marriage relation is domiciled in a "foreign jurisdiction."

In 28 *New Jersey Equity*, 581, it was held that a decree of divorce will have no extra territorial effect when the defendant is domiciled in another State and is not served with process nor with notice of the proceedings.

At page 585 the court by its Chief Justice says: "In "the present case it is claimed that the judgment in the "court of Illinois had the effect not only of changing the "status of the appellant in that State and thus, in that "respect enforcing the policy of the laws of that locality, "but the future effect of changing the status of the re- "spondent in this State, her citizenship here being undis- "puted. The right of the foreign court to adjudicate "with respect to the status of its own domiciled citizen is "undisputed; but I fail to see how its right to decide the "status of a citizen of this State, by such adjudication, is "to be conceded. It seems to me that a judgment can "carry with it *per se* no extra territorial force when the "jurisdiction in the case rests alone on the fact that the "complainant has his domicile within such jurisdiction. "All the claim which such an adjudication has to for- "eign recognition, in my opinion, rests on the ground of "comity. It is not a judgment such as is entitled to "recognition and enforcement in other States by force of "the act of Congress and the constitution of the United "States. In my opinion it is only judgments that ensue "from jurisdiction regularly obtained over the parties by "service of process upon them, or by voluntary appear- "ance, or when the proceeding is strictly *in rem.*, that "carry with them these high sanctions and which there- "fore, are everywhere conclusive. Jurisdiction in di- "vorce suits arising out of the status and domicile of one of

"the parties, cannot impart to a judgment any such ef-
"ficiency."

In reference to this class of divorces obtained by a resident of a State against a resident of another State, Story, in his work on Conflict of Laws, says: "There is still one "further descent against which almost all civilized States "have hitherto protested, but which, to the great discredit "of the American character and name, some of the Amer-"ican States seem disposed to yield: that of giving effect "to merely *ex parte* decrees of divorce, granted upon the "petition of one of the parties, domiciled temporarily or "permanently in a State foreign to that where the alleged "cause of the divorce occurred, and where both parties "were at the time domiciled, and where the other party "still resides and is domiciled, unless that domicile can "be transferred, *in invitum*, after the separation of the "parties. But we are happy to believe that this painful "disregard of the most vital principles of international "jurisprudence. has not been adopted or countenanced in "those States whose decisions are most regarded as author-"ity, both at home and abroad."

Story on Conflict of Laws, 7th Ed., Sec. 230 d., and cases cited in note.

The judgment of divorce obtained in Kentucky by Mr. Atherton against Mrs. Atherton is inoperative and void, and of no force or effect as to her, for another reason. It was obtained in violation of the provision of the constitution of the United States, which provides, that no person shall be deprived of property without due process of law. Due process of law required personal service of process upon Mrs. Atherton in Kentucky or her appearance in the action.

Ward v. Boyce, 152 *N. Y.*, 191.
Pennoyer v. Neff, 95 *U. S.*, 714, 733.

In 152 *N. Y., page* 195, the court says: "A party "cannot be deprived of property without due process of "law, and that term in its application to judicial proceed- "ings means a course of legal proceedings according to "those rules and principles which have been established "by our jurisprudence for the protection and enforce- "ment of private rights. If the proceedings involve the "determination of the personal liability of the defendant, "he must be brought within the jurisdiction, by service "of process within the State, or voluntary appearance. "If it be a proceeding *in rem* the *res* must have been "seized or attached, or at least must be within the juris- "diction." (Several authorities cited.)

In 95 *U. S., page* 733, the court, speaking of judicial proceedings within this provision of the Constitution, says: "They then mean a course of legal proceedings, "according to those rules and principles which have been "established in our systems of jurisprudence for the pro- "tection and enforcement of private rights. To give "such proceedings any validity there must be a tribunal "competent by its constitution—that is, by the law of its "creation—to pass upon the subject matter of the suit; "and if that involves merely a determination of the per- "sonal liability of the defendant, he must be brought "within its jurisdiction by service of process within the "State, or his voluntary appearance."

Third.

The provisions in the New York judgment for alimony and for the custody and maintenance of the child, were legal and proper.

New York Code of Civil Procedure, Sections 1762, 1766.

Matter of Waldron, 13 *Johnson*, (*N. Y.*) 418.
Mercein v. People, 25 *Wend.*, (*N. Y.*) 64, 106.
Matter of Welch, 74 *N. Y.*, 299.
Allen v. Allen, 105 *N. Y.*, 628.
People v. Walts, 122 *N. Y.*, 238.

The agreement between Mr. and Mrs. Atherton did not prevent such provisions. It was not binding upon the Court so as to take from it the power to provide for the custody of the child and for its best interests and welfare.

People v. Mercein, 3 *Hill*, (*N. Y.*) 400, 411.
Bush v. Brown, 35 *Hun*, (*N. Y.*) 324.
Allen v. Alfick, 64 *How.*, (*N. Y.*) 380.

Mr. Atherton cannot complain that the terms of the agreement were not carried into the judgment in New York. He did not consider the agreement binding upon himself or the court in Kentucky. They ignored it and its provisions in his action; the provisions of the agreement for the custody of the child and for allowances to the child and Mrs. Atherton were not carried into the judgment in that action; no allowance was made either for the child or for Mrs. Atherton. Having thus ignored the agreement in his action, he cannot justly complain that she disregarded it in her action.

Fourth.

What, then, will be the decision of this court as to the effect of the judgment obtained in Kentucky by Mr. Atherton, a resident and citizen of that State, against his wife, a resident and citizen of the State of New York? It is a most important question and upon its decision will

rest much of good or evil for our country and its people. The already large number of divorces, increasing yearly in a greater proportion than the increase of our population,and carrying with them the right to the parties to again marry, is arousing in the minds of all truly Christian people a most profound alarm. The number of divorced men and women now living in this country and who have again married, aggregate at this time, hundreds of thousands. It is indisputable that such a condition of affairs speaks far from well for the morals of our people. This divorce evil has already become so great that religious denominations are raising their voices in solemn protest. But recently a prominent bishop at a diocesan convention in New York, speaking of the growing tendency of divorces in this country, and in favor of a canon forbidding the remarriage of divorced parties, said: "In this "direction nothing has been more serious than those re- "sults which have affected the family and especially the "institutions and obligations of marriage. These last have "come to be so lightly regarded that now, at length, the "least thoughtful among us are beginning to realize the "vicious tendencies in some forty or fifty different com- "monwealths of our composite and contradictory legisla- "tion,and to recognize that the facility with which the mar- "riage relation may be taken on and put off is a menace to "the foundations of society and the jest of the civilized "world."

The case now before the court is not one where courts are called upon to strain the law. On the contrary, it is far better that the most strict construction should be maintained so that the applications for and the obtaining of divorces should be as far as possible checked. For the greater the check and the more legal obstructions that can be put in the way, the less will be the applications therefor and the better will be the morals of our people.

We submit upon sound reason and authority that this court should apply the same rule to the judgment in question, that is uniformly applied in actions *in personam*, brought by a resident and citizen of one State against a resident and citizen of another State; to disregard the idea that the marital relation creates a *status*, and that such *status* is a *res*, and therefore, actions for divorce are actions *in rem;* to treat such actions as actions *in personam;* and to hold that the action in Kentucky was an action *in personam;* and that the judgment therein obtained, upon substituted service only, and without any appearance on the part of the defendant, was and is absolutely null and void, inoperative and of no force or effect, either in Kentucky, New York, or any other State. If such course is taken, a great many troublesome questions, and conditions, and much conflict between the States, as to the effect of such judgments within their respective boundaries, will be avoided, and cease to a great extent. We will be rid of the conditions, that in one State the marriage is dissolved while in another State it remains in full force; and that in one State a man or woman is single and free to marry, while in another State he or she is married and remains subject to all the obligations of marriage.

The objection to such a decision is made, that if such a rule should be adopted and enforced in divorce actions some innocent parties might suffer; that one of the married parties, guilty of acts for which by the law of the State of which they are residents, a divorce may be granted, may have removed to a State where no divorce is permitted, and unless the other party can bring an action in the State of his or her residence, and maintain it upon substituted service, he or she would be without redress. Conceding this, does it give a sufficient reason for the courts to change the law, and make an exception to a long established rule? Though some might suffer, we do not believe their number would bear any compari-

son with the great number of innocent parties who will suffer, if the rule contended for by the plaintiff in error should be adopted. If his contention should prevail, how many innocent parties will be hereafter divorced without any hearing whatever; parties who never heard of any proceedings against them, or, hearing of them, have not been able to attend in a distant State and defend the unjust actions brought against them? Where one innocent party may suffer in the first case, hundreds will suffer in the latter case.

But if the court shall be of the opinion that such judgments in divorce actions, obtained upon substituted service, are valid in the State where rendered; that the judgment obtained in Kentucky by Mr. Atherton was valid and dissolved the marriage between himself and wife in that State; then we submit that it was not and is not valid, and has no force or effect in the State of New York, against Mrs. Atherton. This is in accordance with the most just rule recognized and acted upon, not only by this court, but by all civilized countries, that no man shall be condemned until after he has had an opportunity to defend himself, and that no man shall be deprived of his rights until after he has had an opportunity to be heard. Any other rule would be a violation of natural justice and most repugnant to the minds and instincts of all just men.

To hold such judgments valid, and to give them full force and effect against the defendants, in the States of their residence and in all the other States, would greatly facilitate divorces, and largely increase their number from year to year. Any State could pass laws giving to its courts power to grant divorces for most trivial causes, and providing for a substituted service of process which would probably never reach or come to the knowledge of the defendants. And judging the future by the

past, large numbers of persons in the other States, would seek the courts of that State, many, if not all of them, without real just cause, and they would there get divorces. The evils resulting to our country from such a state of affairs, no man can tell.

Fifth.

The judgment of the New York court should be affirmed.

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